Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO A-02-28 OF 1997, A-03-45 OF 1997 AND A-03-54 OF 1997
NH CHAN, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
20 MARCH 2000

Civil Procedure *— Summons for directions — Delay in taking out summons — Defendant applied to dismiss action before plaintiff could take out summons — Whether plaintiff's summons for directions should be dismissed — Rules of the High Court 1980 O 25 r 1(1), (4) & (5)*

Contract *— Terms — Reciprocal promise — Performance of — Application for specific performance to execute transfer of titles to plaintiff — Plaintiff required under contract to pay demanded sum in order to obtain release of titles — Nature of terms, determination of — Whether performance of subsidiary term could be claimed before fundamental term had been performed — Contracts Act 1950 s 55*

The plaintiff instituted proceedings against the defendant for specific performance of an agreement contained in a letter, in particular para (c) thereof, which was for the defendant to execute the transfer of eight titles named in the paragraph to the plaintiff. Paragraph (d) of the agreement stated that the plaintiff had to pay Malayan Banking Bhd RM1,186,640 in order to obtain the release of the said eight titles and the defendant's 23 titles from the bank. The plaintiff had failed to pay the sum demanded by the bank and it managed to get from the bank only the 23 titles which belonged to the defendant and which it kept. The plaintiff had applied for and obtained an interlocutory injunction restraining the defendant from disposing of or dealing with the land described in the eight titles. The defendant appealed against this order granting the injunction ('the first appeal'). The plaintiff had also applied for a summons for directions under O 25 r 1(1) of the Rules of the High Court 1980 ('the RHC'). The summons for directions was taken out 53 days after pleadings were deemed to be closed. But before the plaintiff could take out any summons for directions, the defendant had filed a summons in chambers to dismiss the action. The deputy registrar granted the plaintiff's application for directions instead which was confirmed by the High Court. The defendant appealed against this order ('the second appeal'). The registrar also dismissed the defendant's application to dismiss the action which was also affirmed by the judge. The defendant appealed against this decision ('the third appeal').

Held, allowing the appeals:

(1) The obligation of the defendant under para (c) was merely a subsidiary term, the non-performance of which did not relieve the plaintiff from his primary obligation under para (d). The obligation of the plaintiff under para (d) was a fundamental term. Therefore the promise of the defendant to execute the eight

transfers in para (c) could not be claimed by the plaintiff till the plaintiff's own promise in para (d) had been performed. The non-performance of the plaintiff's promise to pay the bank in full and to recover all the 31 titles from the bank was fatal to its case. If the plaintiff failed to perform its promise in para (d), it could not claim the performance of the reciprocal promise by the defendant in para (c) by virtue of s 55 of the Contracts Act 1950. If the plaintiff was not entitled to make such a claim against the defendant till its own obligation in para (d) had been performed, then its action against the defendant must surely fail. Since the plaintiff had no cause of action against the defendant in its statement of claim, there was no legal basis for the interlocutory injunction to be granted or for it to be continued. Without a cause of action, no serious question for trial was disclosed to sustain the injunction that was obtained against the defendant (see p 159C–F).

(2) Since the plaintiff did not take out a summons for directions within the time of one month as stipulated in r 1(1) and since the defendant had already applied under r 1(4) to dismiss the action before the plaintiff could take out any summons for directions, the court below ought to have dismissed the plaintiff's summons for direction or made no order on it and heard the defendant's summons to dismiss the action (see p 161H–I).

(3) The defendant's application to dismiss the action should have been heard and an order made on it under O 25 r 1(5). It should not have been dismissed in preference to making an order under the plaintiff's summons for directions, which was not taken out within time. The third appeal must therefore be allowed. However, in allowing the appeal, the court had to act under r 1(5) since the court below did not do so. As the plaintiff's action was quite unsustainable, it was futile and a waste of time to deal with the defendant's application as a summons for directions instead of dismissing the action. In the event, it was more appropriate in the circumstances of the present case to dismiss the action (see p 162E–G).

[Bahasa Malaysia summary

Plaintif memulakan prosiding terhadap defendan untuk perlaksanaan spesifik suatu perjanjian yang terkandung di dalam sepucuk surat, khususnya perenggan 3 di dalamnya, yang mana adalah supaya defendan menyempurnakan pemindahan lapan hakmilik yang dinamakan di dalam perenggan tersebut kepada plaintif. Perenggan (d) perjanjian tersebut menyatakan bahawa plaintif mesti membayar Malayan Banking Bhd, RM1,186,640 bagi mendapatkan pelepasan lapan hakmilik tersebut dan 23 hakmilik defendan daripada bank tersebut. Plaintif telah gagal membayar wang yang dituntut oleh bank tersebut dan berjaya mendapatkan daripada bank tersebut hanya

A 23 hakmilik kepunyaan defendan dan yang mana telah disimpan olehnya. Plaintif telah memohon dan memperolehi injunksi interlokutori yang menghalang defendan daripada melupuskan atau berurusan dengan tanah yang diterangkan di dalam lapan hakmilik tersebut. Defendan merayu terhadap perintah ini yang memberikan injunksi tersebut ('rayuan pertama tersebut'). Plaintif telah juga B memohon untuk mendapatkan saman untuk arahan di bawah A 25 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Saman untuk arahan tersebut telah dikeluarkan 53 hari selepas pliding dianggap tutup. Tetapi sebelum plaintif boleh mengeluarkan sebarang saman untuk arahan, defendan telah pun memfailkan satu saman C dalam kamar untuk menolak tindakan tersebut. Pendaftar sebaliknya telah meluluskan permohonan plaintif untuk arahan yang mana telah disahkan oleh Mahkamah Tinggi. Defendan merayu terhadap perintah ini ('rayuan kedua tersebut'). Pendaftar tersebut juga menolak permohonan defendan untuk menolak tindakan tersebut yang mana telah juga disahkan oleh hakim. Defendan telah merayu D terhadap keputusan ini ('rayuan ketiga tersebut').

Diputuskan, membenarkan rayuan-rayuan tersebut:

(1) Kewajipan defendan di bawah perenggan (c) adalah hanya syarat subsidiari, ketidak-laksanaannya tidak melepaskan plaintif E daripada kewajipan utama beliau di bawah perenggan (d). Kewajipan plaintif di bawah perenggan (d) merupakan satu syarat penting. Oleh itu janji defendan untuk melaksanakan lapan pindah milik tersebut dalam perenggan (c) tidak boleh dituntut oleh plaintif sehingga janji plaintif sendiri dalam perenggan (d) telah dilaksanakan. Ketidaklaksanaan janji plaintif untuk F membayar bank tersebut sepenuhnya dan untuk memperolehi semula semua 31 hakmilkik daripada bank tersebut telah memudaratkan kesnya. Jika plaintif gagal untuk melaksanakan janjinya dalam perenggan (d), ia tidak boleh menuntut perlaksanaan janji bersaling oleh defendan dalam perenggan (c) menurut s 55 Akta Kontrak 1950. Jika plaintif tidak berhak untuk G membuat tuntutan yang sedemikian terhadap defendan sehingga kewajipannya sendiri dalam perenggan (d) telah dilaksanakan, maka tindakannya terhadap defendan semestinya gagal. Oleh kerana plaintif tidak mempunyai kausa tindakan terhadap defendan dalam pernyataan tuntutannya, maka tiada asas yang H sah bagi pemberian injunksi interlokutori atau untuk ia diteruskan. Tanpa kausa tindakan, tiada persoalan serius untuk perbicaraan telah didedahkan bagi mempertahankan injunksi yang telah diperolehi terhadap defendan (lihat ms 159C–F).

(2) Oleh kerana plaintif telah tidak mengeluarkan saman untuk arahan dalam tempoh masa satu bulan seperti mana yang I ditetapkan dalam k 1(1) dan oleh kerana defendan telah pun memohon di bawah k 1(4) untuk menolak tindakan sebelum plaintif boleh mengeluarkan sebarang saman untuk arahan,

mahkamah di bawah sepatutnya menolak saman untuk arahan plaintif atau tidak membuat perintah kepadanya dan mendengar saman defendan bagi menolak tindakan tersebut (lihat ms 161H–I). A

(3) Permohonan defendan untuk menolak tindakan tersebut seharusnya didengar dan satu perintah dibuat ke atasnya di bawah A 25 k 1(5). Ia tidak seharusnya ditolak dengan keutamaan untuk membuat satu perintah di bawah saman untuk arahan plaintif, yang mana telah tidak dikeluarkan dalam tempoh masanya. Rayuan ketiga semestinya oleh itu dibenarkan. Walau bagaimanapun, dalam membenarkan rayuan tersebut, mahkamah terpaksa bertindak di bawah k 1(5) kerana mahkamah di bawah tidak melakukannya. Oleh kerana tindakan plaintif agak tidak boleh dipertahankan, ia adalah sia-sia dan membuang masa untuk berurusan dengan permohonan defendan sebagai suatu saman untuk arahan dan bukan menolak tindakan tersebut. Bagaimanapun, adalah lebih berpatutan dalam keadaan kes semasa untuk menolak tindakan tersebut (lihat ms 162E–G).] B C D

Notes

For a case on delay in taking out summons for directions, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 4796.

For cases on terms generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3009–3094. E

Cases referred to

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675 (refd) F

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah [1995] 1 MLJ 193 (refd)

Legislation referred to

Contracts Act 1950 s 55 G

Rules of the High Court 1980 O 25 r 1(1), O 25 r 1(4), O 25 r 1(5)

Appeal from: Civil Suit No 22–137 of 1996 (High Court, Ipoh)

Hira Singh (Asbir, Hira Singh & Co) for the appellant.

SY Lee (Mohd Noor & SY Lee) for the respondent. H

NH Chan JCA (delivering judgment of the court): These are three appeals by the same appellant (Dial Kaur) with the same respondent (Mann Foong Realty Sdn Bhd). The appellant was the defendant and the respondent was the plaintiff in the proceedings instituted by the plaintiff for specific performance of an agreement in writing contained in a letter from the solicitors for the plaintiff (Messrs Mohd Noor & SY Lee) to the solicitors for the defendant (Messrs Asbir, Hira Singh & Co). We have allowed all three appeals and we give our reasons below. We will deal with the three appeals separately. I

A *Civil Appeal No A–02–28 of 1997*

The plaintiff's action is for specific performance of an agreement made between the plaintiff and the defendant in exchange of correspondence between their solicitors which culminated in an agreement the terms of which were contained in the following letter.

B This is the plaintiff's solicitors' letter to the defendant's solicitors:

Mohd Noor & SY Lee
Your Ref: HS/2645/slc
Our Ref: LSY/M4849/89BC 27 July 1995

C Messrs Asbir, Hira Singh & Co
Advocates & Solicitors
No 6, Jalan Maharaja Lela,
(Station Road)
30000 Ipoh By Hand

D Dear Sirs,

Re: Ipoh High Court Suits Nos 22–210–89 and 22–208–89
Dial Kaur a/p Tara Singh v Mann Foong Relty Sdn Bhd

With reference to the telephone conversation between your Mr Hira Singh and our Mr SY Lee, we confirm that the terms of settlement are as follows:

(a) Our clients are to pay your client the sum of RM23,000;

E (b) Our client will settle all outstanding quit rent and assessment payable in respect of the 54 lots involved up to date hereof;

(c) Your client is to execute the eight (8) transfers of the land known as Lot Nos 655, 656, 658, 659, 660, 661, 662 and 663 together with the PDS 15 and the CKHT 1 to our clients or their nominees;

F (d) Our client will settle the RM1,186,640 due to Malayan Banking Berhad to redeem (sic) the 8 titles of our client and your client's 23 titles;

(e) The guarantors in the agreement dated 19 March 1984 are released;

(f) The above two cases are to be withdrawn with no order as to costs;

(g) There be no further claim by either party against the other.

G Yours faithfully

Sgd
cc client

The plaintiff's claim in the action is for the defendant to perform her promise in para (c) of the above agreement, which is for the defendant to H execute the transfer of the eight titles named in the paragraph to the plaintiff. In the court of first instance the plaintiff had applied for and obtained an interlocutory injunction restraining the defendant from disposing of or dealing with the land described in the eight titles. The defendant appeals to the Court of Appeal against this order granting the injunction.

I We are of the view that the real issue before us is quite straightforward. It is simply a matter of construing the effect of these two paras, namely, (c) and (d) in the agreement. For convenience we have reproduced the two paras below:

(c) Your client is to execute the eight (8) transfers of the land known as Lot Nos 655, 656, 658, 659, 660, 661, 662 and 663 together with the PDS 15 and the CKHT 1 to our clients or their nominees.

(d) Our client will settle the RM1,186,640 due to Malayan Banking Berhad to redeem the 8 titles of our client and your client's 23 titles;

In this respect s 55 of the Contracts Act 1950 applies. It reads:

> When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and if the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non-performance of the contract.

This is a case where there were reciprocal promises to be performed by the two parties such that the performance of the promise by one party could not be claimed by the other till the other party's own promise had been performed. In this case the reciprocal promises in the agreement consisted of paras (c) and (d) such that the performance of the promise in para (c) by the defendant could not be claimed by the plaintiff till the plaintiff's own promise in para (d) had been performed. And if the plaintiff failed to perform its promise in para (d) it could not claim the performance of the reciprocal promise by the defendant in para (c). Here we know that the plaintiff had to perform its promise in para (d) first before it could call upon the defendant to perform her promise in para (c) because in para (d) the plaintiff had to pay Malayan Banking Bhd RM1,186,640 in order to obtain the release of the said eight titles and the defendant's 23 titles from the bank. [Paragraph (d) uses the word 'redeem' in the phrase 'to redeem the eight titles of our client and your client's 23 titles'. I pause here to interpolate that it is wrong to use the word 'redeem' with reference to the National Land Code. A mortgage of land involves a conveyance of the land from the mortgagor to the mortgagee so that the mortgagor can redeem his land by a re-conveyance of it to him from the mortgagee upon repayment of the loan (this, in English law, is called the equity of redemption). On the other hand, a charge under the National Land Code does not involve any transfer of the land at all. The proprietorship of the land remains all the time with the chargor (owner). A charge is a registered interest in land that is charged to the creditor (chargee) as security for a loan. When the loan is repaid the charge can be discharged]. In *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675, Gopal Sri Ram JCA said at p 682:

> Another approach to the problem in cases that involve synallagmatic contracts is to look at the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one ...

And at p 684 he said this:

> ... It is not difficult to recognize that, having regard to the terms of the first sale agreement as a whole, the stipulation as to the payment of the purchase

price is a fundamental term. Equally it is plain that the obligation to deliver the executed instrument of transfer is merely a subsidiary term, the non-performance of which does not relieve the appellant from his obligations under the contract. The learned judicial commissioner, therefore, rightly gave effect to the principles that govern this case and held the appellant's failure to pay the purchase price to be fatal to its case.

There is no doubt, as was repeatedly pointed out to counsel in the course of his argument, that the result may well have been different if ... the obligation on the part of his client to pay the purchase price had been made conditional upon the delivery-up by the respondent of the memorandum of transfer. But that is not the case here.

Applying the above reasoning to the present case, it is plain that the obligation of the defendant under para (c) to execute the eight transfers of the land in question to the plaintiff is merely a subsidiary term, the non-performance of which does not relieve the plaintiff from his primary obligation under para (d) of the contract. The obligation of the plaintiff under para (d) to pay RM1,186,640 to Malayan Banking to settle the debt due to the bank so as to obtain the release of all the 31 titles from the bank and to have the charge discharged is a fundamental term. It is plain, therefore, that the promise of the defendant to execute the eight transfers in para (c) could not be claimed by the plaintiff till the plaintiff's own promise in para (d) had been performed. In our judgment the non-performance of the plaintiff's promise to pay the bank in full and to recover all the 31 titles from the bank is fatal to its case. If the plaintiff failed to perform its promise in para (d), it could not claim the performance of the reciprocal promise by the defendant in para (c); see s 55 of the Contracts Act 1950. If the plaintiff was not entitled to make such a claim against the defendant till its own obligation in para (d) had been performed then his action against the defendant must surely fail. Since the plaintiff had no cause of action against the defendant in its statement of claim, there was no legal basis for the interlocutory injunction to be granted or for it to be continued. Without a cause of action, no serious question for trial was disclosed to sustain the injunction that was obtained against the defendant: see *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah* [1995] 1 MLJ 193 (CA). This is how Gopal Sri Ram JCA put it, at pp 206–207:

> To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. *If* he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that *no serious question is disclosed, that is an end of the matter and the relief is refused.* On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry ... (Emphasis added.)

See *Siskina (Cargo Owners) v Distos Compania Na Viera SA* [1977] 3 WLR 818, HL (E) where Lord Diplock said this at p 825: A

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. B

And see also *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at p 19 where Salleh Abas LP said: C

> Since the suit against UEM [United Engineers (M) Berhad] is not maintainable, there is therefore no question of the respondent's entitlement to a remedy of declaration and injunction, permanent or otherwise. The interim injunction which was granted against UEM has no legal basis.

We have therefore allowed the appeal and dissolved the injunction.

For completeness some background information here may not be amiss. On 18 August 1995, the plaintiff's solicitors paid to Malayan Banking Bhd two cheques for the total sum of RM900,000 to obtain the release of the 23 titles that belonged to the defendant. The bank handed these 23 titles to the plaintiff's solicitors for the purpose of discharging the charge on them. The plaintiff later on 24 August 1995 paid a further sum of RM274,640 in the hope that that would be sufficient to discharge the charge on all the 31 titles (8 + 23). But the bank insisted that a sum of RM136,166.89 was still due to the bank and refused to release the remaining 8 titles. Plainly the plaintiff had not performed its obligation to obtain all the 31 titles because it failed to pay the sum demanded by the bank. It managed to get from the bank only the 23 titles which belonged to the defendant and which it kept. D E F

These 31 titles had been charged to the bank by the defendant as security for the repayment of a loan to the plaintiff from the bank to finance the development of the land as a housing estate under the parties' joint venture agreement. As the plaintiff had failed to repay the bank the loan, the bank had applied to the High Court at Ipoh (Originating Summons No 24–905–1989) for an order for sale of all the charged lands against the defendant as chargor. The bank obtained an order for sale of all the 31 plots of land on 11 January 1992. But before the land could be sold by public auction, the parties entered into the above agreement. As the bank was demanding to be paid the amount still owing to the bank and in order to prevent the remaining eight plots from being sold by public auction the defendant was compelled to pay off the bank with the sum of RM146,841 to discharge the charge on the eight plots. Upon receiving the payment, the bank handed the eight titles to her. Just as the plaintiff has kept the 23 titles that are the defendant's, the defendant has also kept the eight titles that would have been the entitlement of the plaintiff had the contract been performed. G H I

We have allowed the appeal with costs here and in the court below and set aside the interlocutory injunction.

Civil Appeal No A–03–45 of 1997

This appeal concerns the plaintiff's application in a summons for directions under O 25 r 1(1) of the Rules of the High Court 1980 ('RHC'). A plaintiff must take out a summons for directions within one month after the pleadings in the action are deemed to be closed. Order 25 r 1(1) is as follows:

> With a view to providing, in every action to which this rule applies, an occasion for the consideration by the court of the preparations for the trial of the action, so that —
>
> (a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and
>
> (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof,
>
> *the plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons in Form 46* (in these rules referred to as a summons for directions) returnable in not less than 14 days. (Emphasis added.)

Here, in the present case, the plaintiff did not take out a summons for directions until 53 days after pleadings were deemed to be closed. But before the plaintiff could take out any summons for directions, the defendant had filed a summons in chambers to dismiss the action. If the plaintiff did not take out a summons for direction within one month after the close of pleadings in accordance with r 1(1), r 1(4) would have entitled the defendant either to take out a summons for directions or to apply for an order to dismiss the action. This is what O 25 r 1(4) says:

> If the plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, *the defendant or any defendant may do so or apply for an order to dismiss the action.* (Emphasis added.)

Faced with the two applications, ie the summons in chambers by the defendant to dismiss the action (O 25 r 1(4)) which was filed earlier and the summons for directions by the plaintiff under O 25 r 1(1) which was taken out later, the deputy registrar granted the plaintiff's application for directions instead. The defendant's appeal against this order which was affirmed by the judge below is the instant appeal. The registrar also dismissed the defendant's application to dismiss the action which was also affirmed by the judge (this is the next appeal).

Since the plaintiff did not take out a summons for directions within the time of one month as stipulated in r 1(1) and since the defendant had already applied under r 1(4) to dismiss the action before the plaintiff could take out any summons for directions, the court below ought to have dismissed the plaintiff's summons for directions or made no order on it and heard the defendant's summons to dismiss the action under r 1(4). The plaintiff's application for directions which was not taken out within time should give way to the defendant's application to dismiss the action as provided for in O 25 r 1(4). It is only when the court is dealing with the

defendant's summons under r 1(4) to dismiss the action that the court has discretion either to dismiss the action or to deal with the defendant's application as if it were a summons for directions (see r 1(5)). Order 25 r 1(5) reads as follows:

> On an application by a defendant to dismiss the action under para (4) the court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions.

Rule 1(4) allows the defendant either to take out a summons for directions or to apply for an order dismissing the action if the plaintiff does not take out a summons for directions in time. But if the defendant applies to dismiss the action under r 1(4), the court may either dismiss the action or deal with the defendant's application as if it were a summons for directions under r 1(5).

We have therefore allowed the defendant's appeal with the result that the plaintiff's summons for directions was struck off. Costs here and in the courts below to the defendant.

Civil Appeal No A–03–54 of 1997

This appeal concerns the defendant's application to dismiss the action under O 25 r 1(4). The courts below have dismissed the defendant's application. Hence the appeal by the defendant. As explained in the earlier appeal, the defendant's application to dismiss the action was made under O 25 r 1(4) after the plaintiff had failed to take out a summons for directions within time. It should have been heard and an order made on it under O 25 r 1(5). It should not have been dismissed in preference to making an order under the plaintiff's summons for directions which was not taken out within time. The appeal must therefore be allowed. However, in allowing the appeal by the defendant, we have to act under r 1(5) since the courts below did not do so. Paragraph 5 of r 1 in O 25 of the RHC enables the court when considering the defendant's application to dismiss under para (4) either to dismiss the action on such terms as may be just or to deal with the application as if it were a summons for directions. In our judgment, as the plaintiff's action is quite unsustainable (see the first appeal above), it is futile and a waste of time to deal with the defendant's application as a summons for directions instead of dismissing the action. In the event, we are of the opinion that it is more appropriate, in the circumstances of the present case, to dismiss the action. This we did under r 1(5).

The defendant's appeal was allowed with costs here and in the courts below.

Appeals allowed.

Reported by Jafisah Jaafar